

SHORT RECORD
17-2042
Filed 05/17/2017

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

**JAM PRODUCTIONS, LTD., EVENT
PRODUCTIONS, INC., STANDING ROOM
ONLY, INC., AND VICTORIA OPERATING
CO., A SINGLE EMPLOYER,**

Petitioners,

v.

**NATIONAL LABOR RELATIONS
BOARD,**

Respondent.

Petition for Review

**PETITION FOR REVIEW OF DECISION AND ORDER
OF THE NATIONAL LABOR RELATIONS BOARD**

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure and Section 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(f), Petitioners, entities that transacts substantial business within this circuit, hereby petition the United States Court of Appeals for the Seventh Circuit for review of, and respectfully requests that the Court set aside, the Decision and Order entered by Respondent in case No. 13-CA-186575. A copy of the Decision and Order, which is reported at 365 NLRB No. 75, is attached as Exhibit A.

Dated: May 17, 2017.

Respectfully submitted,

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EXHIBIT A

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Jam Productions, Ltd., Event Productions, Inc., Standing Room Only, Inc., and Victoria Operating Co., a single employer and Theatrical Stage Employees Union Local No. 2, IATSE. Case 13-CA-186575

May 16, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE
AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on October 20, 2016, by Theatrical Stage Employees Union, Local No. 2, IATSE (the Union), the General Counsel issued the complaint on January 19, 2017, alleging that JAM Productions, Ltd., Event Productions, Inc., Standing Room Only, Inc., and Victoria Operating Co., a single employer (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it following the Union's certification in Case 13-RC-160240. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On February 3, 2017, the General Counsel filed a Motion for Summary Judgment. On February 6, 2017, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification of representative on the basis of its contentions, raised and rejected in the underlying representation proceeding, that the Union unlawfully provided economic benefits to employees to induce them to support the Union, the Regional Director's rulings as to the challenged ballots were erroneous, the Regional Director failed to conduct a proper investigation of the Respondent's objections, the Regional Director improperly refused to schedule an evidentiary hearing to resolve the Respondent's objections, and the Respondent was denied due process of law.

In addition, the Respondent denies that at all material times JAM Productions, Ltd., Event Productions, Inc., Standing Room Only, Inc., and Victoria Operating Co., have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as a single-integrated business enterprise, and denies that it is a single employer within the meaning of the Act. The Respondent also denies the appropriateness of the unit.

The Respondent admits, however, that it entered into a Stipulated Election Agreement in the underlying representation proceeding.¹ In that Stipulated Election Agreement, the Respondent stipulated that JAM Productions, Ltd., Event Productions, Inc., Standing Room Only, Inc., and Victoria Operating Co., constitute a single employer, and it further stipulated that the unit was appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. The commerce section of the Stipulated Election Agreement specifically states that "[f]or purposes of the National Labor Relations Act, JAM Productions, Ltd., Event Productions, Inc., Standing Room Only Inc., and Victoria Operating Company, LLC, a single employer, with a place of business in Chicago, Illinois, is engaged in the business of producing concerts, shows, and events at venues ... in Chicago, Illinois."² The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine in this proceeding the stipulation of single employer status and the appropriateness of the unit in the representation

¹ The complaint, at par. II (b), alleges that "[o]n September 30, 2015, Respondent entered into a Stipulated Election Agreement in Case 13-RC-160240 in which it acknowledged JAM Productions, Ltd., Event Productions, Inc., Standing Room Only, Inc., and Victoria Operating Co., status as a single employer." The Respondent's answer denies these allegations, "except to admit that the parties entered into a Supplemental Election Agreement on October 2, 2015 to make clear that to avoid the time and expense of a hearing a Stipulated Election Agreement was entered into solely for the purpose of resolving contested issues in Case No. 13-RC-160240 only." The Respondent's statement is an apparent reference to a "Second Supplemental Election Agreement" which was entered into on October 2, 2015, by the Respondent and the Union, but not the General Counsel. However, neither the Second Supplemental Election Agreement nor the Stipulated Election Agreement indicate that the stipulated facts are limited "solely" to resolving issues in the representation proceeding, and the Respondent has provided no evidence in support of this assertion.

² During the representation proceeding, the Respondent did not withdraw from the Stipulated Election Agreement, object to its status as a single employer, or challenge the appropriateness of the unit.

proceeding. We therefore find that the Respondent's denial that JAM Productions, Ltd., Event Productions, Inc., Standing Room Only, Inc., and Victoria Operating Co., constitute a single employer and its denial that the unit is appropriate do not raise any issue warranting a hearing in this proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.³

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

Based on its entry into the Stipulated Election Agreement described above, we find that JAM Productions, Ltd., Event Productions, Inc., Standing Room Only, Inc., and Victoria Operating Co., constitute a single employer within the meaning of the Act.

At all material times, JAM Productions, Ltd., an Illinois corporation with an office and place of business located at 207 W Goethe Street, Chicago, Illinois, has

been engaged in the business of promoting and producing concerts, shows, and events by various performers, including at venues the Riviera Theatre, Park West Theatre, and Vic Theatre in Chicago, Illinois. During the calendar year preceding issuance of the complaint, a representative period, JAM Productions, Ltd., in conducting its business operations described above, derived gross revenues in excess of \$500,000 and purchased and received at its Chicago, Illinois facilities goods and services valued in excess of \$5000 directly from points outside the State of Illinois. We find that JAM Productions, Ltd. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.⁴

At all material times, Event Productions, Inc., an Illinois corporation with an office and place of business located at 207 W Goethe Street, Chicago, Illinois, has been engaged in the business of supplying labor to third parties. During the calendar year preceding issuance of the complaint, a representative period, Event Productions, Inc., in conducting its business operations described above, derived gross revenues in excess of \$500,000. We find that Event Productions, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.⁵

At all material times, Standing Room Only, Inc., an Illinois corporation with an office and place of business located at 207 W Goethe Street, Chicago, Illinois, has managed operations at Park West in Chicago. During the calendar year preceding issuance of the complaint, a representative period, Standing Room Only, Inc., in conducting its business operations described above, derived gross revenues in excess of \$500,000. We find that Standing Room Only, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.⁶

³ The Respondent's request that the complaint be dismissed and that it be awarded its costs, attorney's fees, and litigation expenses is therefore denied.

In the underlying representation proceeding, then-Member Miscimarra would have overruled four ballot challenges sustained by the Regional Director. The Board agent had challenged the ballots on the ground that the employees had been hired after the eligibility date set forth in the Stipulated Election Agreement. Member Miscimarra found, however, that where the Board's blocking charge doctrine results in a change to the election date in the Stipulated Election Agreement, the Board cannot reasonably enforce other material terms of the Agreement—i.e., the eligibility date—against either party. *Tekweld Solutions, Inc.*, 361 NLRB No. 18, slip op at 3-4 (2014) (Member Miscimarra, dissenting in part), aff'd, 639 Fed. Appx. 16 (2d Cir. 2016). He also noted that there had been no prejudice to the Union because it received proper notice regarding the four voters when the Respondent submitted the *Excelsior* list. He would then have reached and denied the Union's request for review with respect to five additional ballots challenged by the Board agent because employees did not meet the stipulated eligibility criteria on grounds unrelated to the election's postponement. While he remains of that view, he agrees that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

⁴ The complaint also alleged that JAM Productions has been promoting and producing concerts, shows, and events by various performers "nationwide", but the Respondent denied this allegation. However, in light of the Respondent's admission that JAM Productions, Ltd. is an employer engaged in commerce under the Act, this denial does not establish a factual issue warranting a hearing.

⁵ The complaint also alleged that Event Productions, Inc. has been engaged in the business of supplying labor, including stagehands, for concerts, shows, and events by various performers at its venues including the Riviera Theatre and Vic Theatre in Chicago, Illinois, and that during the calendar year preceding the issuance of the complaint, Event Productions, Inc. purchased and received at its Chicago, Illinois facilities goods and services valued in excess of \$5000 directly from points outside the State of Illinois. The Respondent denied these allegations. However, in light of the Respondent's admission that Event Productions, Inc. is an employer engaged in commerce under the Act, these denials do not establish a factual issue warranting a hearing.

⁶ The complaint also alleged that Standing Room Only, Inc. has been engaged in the business of promoting special events including fundraisers, weddings, and corporate parties at venues including the Park West

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At all material times, Victoria Operating Co., an Illinois corporation with an office and place of business located at 207 W Goethe Street, Chicago, Illinois, operates the Vic Theatre in Chicago, Illinois. During the calendar year preceding the issuance of the complaint, a representative period, Victoria Operating Co., in conducting its business operations described above, derived gross revenues in excess of \$500,000 and purchased and received at its Chicago, Illinois facilities goods and services valued in excess of \$5000 directly from points outside the State of Illinois. We find that Victoria Operating Co. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.⁷

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on May 16, 2016, the Regional Director for Region 13, on June 20, 2016, issued a Corrected Report on Objection and Challenges and Certification of Representative in Case 13-RC-160240, certifying the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time stage production employees employed by the Respondent at the Riviera, Park West, and Vic Theatres, but excluding production managers and crew leaders, office clerical employees and guards, professional employees and supervisors as defined in the Act.

On January 5, 2017, the Board denied the Respondent's request for review of the Regional Director's Corrected Report on Objection and Challenges and Certification of Representative and found it unnecessary to pass on the Union's request for review.

Theatre in Chicago, Illinois, and other venues in and around Chicago, Illinois, and that during the calendar year preceding the issuance of the complaint, Standing Room Only, Inc. purchased and received at its Chicago, Illinois facilities goods and services valued in excess of \$5000 directly from points outside the State of Illinois. The Respondent denied these allegations. However, in light of the Respondent's admission that Standing Room Only, Inc. is an employer engaged in commerce under the Act, these denials do not establish a factual issue warranting a hearing.

⁷ The complaint also alleged that Victoria Operating Co. has been engaged in the business of providing stagehands at the Vic Theater in Chicago, Illinois, but the Respondent denied this allegation. However, in light of the Respondent's admission that Victoria Operating Co. is an employer engaged in commerce under the Act, this denial does not establish a factual issue warranting a hearing.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

On June 20, July 21, and September 22, 2016, and on January 9 and 16, 2017, the Union, by emails to the Respondent's legal representative, requested that the Respondent meet to bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit. Since about June 20, 2016, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since June 20, 2016, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, JAM Productions, Ltd., Event Productions, Inc., Standing Room Only, Inc., and Victoria Operating Co., a single employer, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Theatrical Stage Employees Union, Local No. 2, IATSE

as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time stage production employees employed by the Respondent at the Riviera, Park West, and Vic Theatres, but excluding production managers and crew leaders, office clerical employees and guards, professional employees and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 20, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 16, 2017

⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Theatrical Stage Employees Union, Local No. 2, IATSE as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

All full-time and regular part-time stage production employees employed by us at the Riviera, Park West, and Vic Theatres, but excluding production managers

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and crew leaders, office clerical employees and guards, professional employees and supervisors as defined in the Act.

Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

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The Board's decision can be found at www.nlr.gov/case/13-CA-186575 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor

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Respondent.

Petition For Review

CERTIFICATE OF SERVICE

The undersigned certifies that Jam Productions, Ltd., et al. Petition for Review of Decision and Order of the National Labor Relations Board is being served this 17th day of May, 2017, upon the following:

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